

## **EXHIBIT 4**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
-----X

WILHELMSSEN PREMIER MARINE  
FUELS AS,

Plaintiff,

v.

07 CV 5798 (CM)

UBS PROVEDORES PTY LTD. AND  
RAE CORP. INTERNATIONAL PTY  
LTD.,

Defendants.

-----X

New York, N.Y.  
September 7, 2007  
11:27 a.m.

Before:

HON. COLLEEN MCMAHON,

District Judge

APPEARANCES

HOLLAND & KNIGHT  
Attorney for Plaintiff  
BY: MICHAEL J. FREVOLA

BETANCOURT, VAN HEMMEN, GRECO & KENYON  
Attorney for Defendants  
BY: JEANNE-MARIE D. VAN HEMMEN

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(Case called)

THE DEPUTY CLERK: Your appearances please.

MR. FREVOLA: Michael Frevola, Holland & Knight, for  
the plaintiff.

THE COURT: Good morning, Mr. Frevola.

MS. VAN HEMMEN: Jeanne-Marie Van Hemmen from the firm  
of Betancourt, Van Hemmen, Greco & Kenyon for defendants UBS  
and Rae Corp.

THE COURT: I don't have any defendant except UBS on  
this caption.

MS. VAN HEMMEN: Yesterday, your Honor, I was only  
counsel for UBS. And then I learned that there had been an  
amended complaint filed by plaintiffs that added in Rae Corp.

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14 Late last night I was appointed by Rae Corp. as well.  
 15 MR. FREVOLA: I don't have a copy of it but actually I  
 16 believe you may have signed it while you were away.  
 17 THE COURT: Somebody else signed it while I was away.  
 18 I see there's an order with a Rae Corp. listed as a defendant.  
 19 There is an amended complaint. Okay.  
 20 MS. VAN HEMMEN: Your Honor, may I proceed?  
 21 THE COURT: Can I talk to plaintiff's counsel first.  
 22 I read the original complaint. What is Rae Corp. and why has  
 23 it been added in?  
 24 MR. FREVOLA: Your Honor, it's a member of the same  
 25 corporate family. And while originally we didn't include it,  
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1 after a few weeks of seeing other indicia, we have common  
 2 address, common telephone numbers, advertisements which refer  
 3 to their terms and conditions. And they say please see Rae  
 4 Corp.'s and then in parentheses UBS, USS's terms and  
 5 conditions. Emails from Mr. Rae come -- for dealing with UBS  
 6 matters, come from Bill Rae at raecorpinternational.com.  
 7 In other words, this Rae Corp. entity was set up on  
 8 March 22 of this year, your Honor, while this dispute was  
 9 unfolding. And with all these similarities, it would appear  
 10 that there's an alter ego issue here playing out.  
 11 In part, we think that may have been borne out also by  
 12 something that happened the last week, which I believe my --  
 13 defendants' counsel is going to mention. We actually  
 14 intercepted what we believe is a retainer payment being made to  
 15 defense counsel the other day in the amount of about ten  
 16 thousand dollars, just short of ten thousand dollars. And it  
 17 was a retainer payment being made by Rae Corp. to counsel.  
 18 And so those facts we think at least support the alter  
 19 ego allegations that we have made in the complaint. That's why  
 20 we amended as opposed to doing it at first.  
 21 THE COURT: Okay. Thank you.  
 22 Ms. Van Hemmen.  
 23 MS. VAN HEMMEN: Your Honor, as I said I am counsel  
 24 for UBS and Rae Corp. as of late last night, and I want to make  
 25 clear, starting out here, that my appearance is for the limited  
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1 purpose of objecting to this court's jurisdiction over this  
 2 matter. It is purely --  
 3 THE COURT: I object to it too, but I'm stuck with  
 4 this odd maritime jurisprudence.  
 5 MS. VAN HEMMEN: I understand that that's the  
 6 allegation made. It's our position that there's not maritime  
 7 jurisdiction over the underlying dispute or over the alter ego  
 8 claims that were brought against Rae Corp.  
 9 I just want to make it clear in the record I am aware,  
 10 as of a telephone conversation I had yesterday with  
 11 Mr. Frevola, that there was also a scheduling conference in  
 12 this matter scheduled today. And I --  
 13 THE COURT: That is the conference that's scheduled  
 14 today. This is the Rule 16 conference in this case.  
 15 MS. VAN HEMMEN: Pardon me?  
 16 THE COURT: This is the Rule 16 conference in this  
 17 case.  
 18 MS. VAN HEMMEN: And I understand that. And I learned  
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19 that this conferences was going forward last night at the same  
20 time that I learned other facts that I'm going to explain to  
21 you compelled me to get to the court as soon as possible. So  
22 it made sense, rather than to adjourn the conference because  
23 there had been no appearance, to use this opportunity to  
24 appear. But again, I want to make it clear, not pursuant to  
25 that court's order, our position is the court does not have  
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1 jurisdiction over the dispute.  
2 THE COURT: Got it. You're making that special  
3 appearance, so specially appear.  
4 MS. VAN HEMMEN: In this case, I represent the  
5 supplier of fuel oil to a number of U.S. Navy affiliated  
6 vessels pursuant to a requirements contract.  
7 THE COURT: who is that?  
8 MS. VAN HEMMEN: That's UBS.  
9 THE COURT: Is a supplier of fuel to the U.S. Navy  
10 pursuant to various contracts.  
11 MS. VAN HEMMEN: wilhelmsen entered into contracts  
12 with UBS in -- from UBS's perspective, in an effort to comply  
13 with its obligations under the requirement contract to supply  
14 the Navy.  
15 THE COURT: I've missed a step. Okay. UBS supplies  
16 fuels to the Navy pursuant to various requirements contracts.  
17 MS. VAN HEMMEN: Pursuant to one requirements  
18 contract, UBS has been providing fuel oil to Navy ships.  
19 THE COURT: Forgive me because I don't know a lot  
20 about naval fuel contracts. It's a requirements contract in  
21 what sense?  
22 MS. VAN HEMMEN: In that it was understood that over a  
23 particular period of time UBS would provide bunker fuels to a  
24 number of vessels at a number of ports, all of which remains to  
25 be determined into the future so that they weren't, each one  
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1 specifically delineated in a contract in and of themselves.  
2 THE COURT: So it wasn't the contract for a specific  
3 amount of fuel to a specific vessel. It was a contract for  
4 fuel to be supplied from time to time as required.  
5 MS. VAN HEMMEN: Correct.  
6 THE COURT: Okay.  
7 MS. VAN HEMMEN: UBS, in order to fulfill its  
8 obligations under the requirements contract went out into the  
9 market to find the bunker fuel. That's where its relationship  
10 with wilhelmsen arose.  
11 wilhelmsen is a trader of bunker fuels. That, your  
12 Honor, is a very different function than a supplier of bunker  
13 fuels.  
14 UBS is supplying fuels to ships. wilhelmsen is  
15 trading bunker fuels as a commodity. They are people at desks  
16 with cell phones, with a knowledge of the market around the  
17 world, without an infrastructure to bring about the physical  
18 supply of fuel oil.  
19 However, with that knowledge, they are in a position  
20 to purchase fuel around the world and simultaneously sell it to  
21 people who are contractually obligated to supply ships. That  
22 is the service that wilhelmsen offered to UBS under a series of  
23 bunker-related transactions that are at the heart of this

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24 dispute.

25 It's our position, your Honor, that that is not a  
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1 maritime contract. Instead, that is what's known in the  
2 industry or known in maritime law as a preliminary contract.  
3 Maritime law does not extend to preliminary contracts.  
4 Back to the facts of this case, a whole number of  
5 specific provisions of fuel, wilhelmsen went to the various  
6 ports, found physical suppliers, and in a simultaneous  
7 transaction bought the fuel from the physical supplier, sold  
8 the fuel to UBS. UBS thereafter arranged with the physical  
9 supplier for the physical supplier to deliver the fuel to the  
10 vessels.

11 That physical supplier in these cases is Sumitomo  
12 Corporation.

13 THE COURT: So when you say wilhelmsen went to ports,  
14 you mean wilhelmsen placed a telephone call from its trading  
15 floor --

16 MS. VAN HEMMEN: Precisely.

17 THE COURT: -- in New York or where --

18 MS. VAN HEMMEN: In Scandinavia; Norway, I believe.

19 THE COURT: So, it bought fuel to supply to UBS,  
20 sold -- immediately resold the fuel to UBS, and wilhelmsen did  
21 not make arrangements for the carrier to the fuel but UBS made  
22 arrangements.

23 MS. VAN HEMMEN: UBS and Sumitomo would then be put in  
24 touch with each other and the U.S. Navy, and a three-way  
25 exchange of information that resulted in a barge being brought  
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1 alongside the Navy ship and the provision of bunkers on the  
2 specific instances occurred.

3 THE COURT: What's a bunker?

4 MS. VAN HEMMEN: I'm sorry. A bunker is a word used  
5 interchangeably for marine fuel oil.

6 MR. FREVOLA: In the context, your Honor, of it being  
7 consumed by the vessel as opposed to it being carried as cargo.  
8 Bunkers are the ones that are in the fuel tank.

9 THE COURT: So, on the Exxon Valdez, the bunkers are  
10 the fuel in the fuel tank. And the stuff that spilled all over  
11 the place that was being carried was cargo.

12 MR. FREVOLA: The term bunkers refers back to, back  
13 when they had coal as a mode of propulsion, and the coal  
14 bunkers.

15 THE COURT: Thank you. I'm learning this maritime  
16 stuff much more quickly than I thought I would have to, but I  
17 am starting to learn, and it does have its own interesting  
18 lingo.

19 MS. VAN HEMMEN: In this specific case, your Honor,  
20 when wilhelmsen quoted a price to UBS for the bunkers that it  
21 was going to sell to trade to it, it included in that price a  
22 barge carrying cost, a charge, an upcharge, supposedly equal to  
23 the cost of a barge carrying the cargo -- the bunkers, excuse  
24 me, alongside the ship, wherever it was going to be delivered.

25 When wilhelmsen sent its invoices to UBS and  
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1 thereafter UBS invoiced the U.S. Navy in order to recover the  
 2 charge and its profit, the U.S. Navy rejected the invoices  
 3 because it found that the bunker charge that was built into the  
 4 cost of the bunker fuel was inadequately supported by support  
 5 documentation.

6 UBS has gone back to wilhelmsen and has requested  
 7 supplemental documentation. wilhelmsen has been unable to  
 8 provide it. And to date, the U.S. Navy is refusing to pay  
 9 those invoices to wilhelmsen -- excuse me to UBS. UBS,  
 10 therefore, doesn't have the money to pay wilhelmsen's invoices,  
 11 and that's the dispute.

12 Again, as I mentioned earlier, it's our view that the  
 13 underlying contract is a preliminary services contract.

14 THE COURT: Fine. How fast can you brief it?

15 MS. VAN HEMMEN: well, if you will allow me, the plot  
 16 thickens. And there's a number of other issues that I need to  
 17 address first. And I do think it will make this whole process  
 18 quicker if I give you the whole context, if we can go into  
 19 that.

20 THE COURT: Okay.

21 MS. VAN HEMMEN: In addition, all of the attachments  
 22 that have occurred against UBS were the attachments of  
 23 electronic fund transfers. I'm not sure if the court is versed  
 24 on this issue --

25 THE COURT: Unfortunately, I'm versed on this issue.

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1 Believe me, if I had been deciding the case, it would have come  
 2 out the other way.

3 MS. VAN HEMMEN: In our review, your Honor, there is a  
 4 good faith basis for a split, given the Aqua Stoli decision.

5 THE COURT: There is no split. Electronic fund  
 6 transfers in this circuit are attachable under winter Storm,  
 7 and Aqua Stoli does not change that. And I read an opinion  
 8 into the record two days ago on this.

9 If you can bring yourself within one of the three Aqua  
 10 stoli exceptions, I'm happy to vacate the attachment;  
 11 otherwise, the answer is no. So don't bother going down that  
 12 road.

13 MS. VAN HEMMEN: A third issue, we believe there is no  
 14 maritime contract, which is a requirement for the vacation.

15 THE COURT: Correct. So I want to know how fast we  
 16 can decide that.

17 MS. VAN HEMMEN: A third issue, your Honor, is  
 18 arbitration.

19 As the complaint is drafted, it has sought these  
 20 attachments in furtherance of an arbitration in London. It  
 21 alleges that there was a contractual undertaking to arbitrate.  
 22 In fact, the arbitration provision that's referred to by  
 23 wilhelmsen is an arbitration provision in Sumitomo's terms and  
 24 conditions which is the contract that governs the sale between  
 25 wilhelmsen and Sumitomo.

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1 So there isn't an arbitration provision between -- in  
 2 the contract between wilhelmsen and UBS and that part of the --  
 3 that part of the remedy sought by wilhelmsen just falls apart.  
 4 No arbitration has been started. There is not a

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5 contractual obligation to arbitrate. So seizing funds here for  
 6 an arbitration that there is no obligation to undertake is  
 7 Draconian.

8 THE COURT: And has not been undertaken yet.

9 MS. VAN HEMMEN: And has not been undertaken yet.

10 THE COURT: Unlike all of the other cases that I've  
 11 had where there's been a pending arbitration.

12 MS. VAN HEMMEN: That's right, your Honor.

13 Another issue is countersecurity. One of the  
 14 provisions of bunkers involved contaminated fuel that was  
 15 subsequently offloaded off the Navy vessel to great expense to  
 16 UBS. The value of that claim is about six hundred thousand.  
 17 UBS wants countersecurity for its claim which it's entitled to  
 18 under Supplemental Rule F. However, we make this request  
 19 without prejudice to our primary position --

20 THE COURT: Well, let's get your primary position  
 21 resolved. Then we can worry about your request under maritime  
 22 law for countersecurity.

23 MS. VAN HEMMEN: I'm wrapping up but I do have to  
 24 explain further what's going on here.

25 Yesterday I learned -- I had an intention as of  
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1 yesterday, your Honor, to bring all of these issues that I've  
 2 just outlined to you before the court in the form of an order  
 3 to show cause where it would be fully briefed and you'd be in a  
 4 better position to rule on it.

5 THE COURT: After I got a response.

6 MS. VAN HEMMEN: Well maybe not.

7 THE COURT: No. After I got a response.

8 I never rule on ultimate issues without getting a  
 9 responses.

10 MS. VAN HEMMEN: Understood. Understood.

11 Mr. Frevola called me yesterday and told me that a  
 12 wire transfer from Rae Corp. coming to my office had been  
 13 seized.

14 THE COURT: Right.

15 MS. VAN HEMMEN: And also that they had amended the  
 16 complaint and alleged alter ego claims against Rae Corp.

17 THE COURT: So, let's -- your problem is that you need  
 18 an immediate decision on whether this is a maritime contract.

19 MS. VAN HEMMEN: No, your Honor. My problem is right  
 20 now I'm working pro se.

21 THE COURT: That's correct. I hear that. So you need  
 22 an immediate decision. Your client needs an immediate decision  
 23 on whether -- on that issue.

24 And if you and your client between you can't figure  
 25 out a way to get the ten thousand dollar retainer to you

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1 without going through the City of New York, then you're less  
 2 creative than I thought.

3 MS. VAN HEMMEN: I think -- well, as I told you, Rae  
 4 Corp. has a similar attachment in place. Rae Corp. is an  
 5 affiliated company. They've alleged alter ego.

6 THE COURT: I can't rule on anything without papers.  
 7 I'm sorry. You can stand there and say: Judge, I don't really  
 8 want to work for nothing. Well put something on a plane to go  
 9 over to Europe and pick up a check.



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10 MS. VAN HEMMEN: In light of the Rae Corp. attachment,  
 11 your Honor, there aren't even alternative sources of funds as  
 12 of this moment in time, as of last night.

13 THE COURT: All I can tell you is this. I am happy to  
 14 entertain, on an emergency basis, a motion to vacate. I am  
 15 happy to put down for a hearing next Friday afternoon, with  
 16 witnesses, argument, and a decision from the bench, a motion to  
 17 vacate. You get me papers by Monday morning.

18 But if you're saying you're not going to get me  
 19 papers, then I'm sorry. There's nothing I can do. I am not  
 20 prepared to rule on an oral application. I won't do it.

21 MS. VAN HEMMEN: I understand, your Honor. I guess my  
 22 goal here is two-fold.

23 THE COURT: And I will not vacate the attachment  
 24 against Rae Corp. without a written application.

25 No, I'm not going to get you the ten thousand dollars.

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1 I appreciate the problem.

2 MS. VAN HEMMEN: Well, my issue I guess is two-fold.  
 3 One is in light of the fact that there's a possibility there  
 4 will be no further funds coming, because the company, as of  
 5 last night, was in such a state they didn't know that they  
 6 would be able to. And it's not a question of creatively  
 7 getting the money here. It's a question of cash flow because  
 8 it has already been in --

9 THE COURT: If it's a question of cash flow, there's  
 10 nothing I can do about that.

11 I don't believe that it's impossible for you to get  
 12 money from Rae Corp.

13 MS. VAN HEMMEN: Well, sitting here right now, I don't  
 14 even know the answer one way or the other.

15 THE COURT: Okay. Obviously, the easiest way to get  
 16 money from Rae Corp. is through an electronic funds transfer  
 17 that would come into your account in New York, but there are  
 18 other ways to get money from Rae Corp.

19 MS. VAN HEMMEN: If Rae Corp. has money.

20 THE COURT: But if Rae Corp. doesn't have money,  
 21 that's not my problem.

22 MS. VAN HEMMEN: It isn't, your Honor. But it does  
 23 create a due process problem. The reason Rae Corp. and UBS  
 24 don't have any money is because of the attachments in place.  
 25 And therefore -- and a corporation can't come in and do this

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1 pro se. Therefore, they do need counsel. And if they don't  
 2 have funds for counsel, then they are not in a position to seek  
 3 justice in this court.

4 THE COURT: Then you need to make a presentation to me  
 5 that's more than standing up saying they don't have money. I  
 6 need something under oath from someone telling me: I am going  
 7 to be deprived of my due process rights under Maritime Rule B  
 8 because I don't have any money in the whole world anywhere. I  
 9 have no money. Okay.

10 I can't do it because you stand up and say my client's  
 11 being deprived. That's not enough for me.

12 MS. VAN HEMMEN: Well, I did feel, in light of the  
 13 developments last night that it was important to come in here  
 14 and at least make a record to the best of my ability at this



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15 time, based on the work that's already been done.  
16 The ten thousand was not money that was going to be  
17 used to brief these issues, your Honor. The ten thousand was  
18 already long outstanding and overdue to just analyze the  
19 situation.  
20 THE COURT: I hear you. You need to be paid -- you  
21 raise -- now you have raised an interesting issue, a due  
22 process issue that's analogous to the issue that arises in  
23 criminal cases when the government attaches for forfeiture  
24 purposes money belonging to a defendant that was going to be  
25 used to pay counsel. This is not a criminal context, but I  
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1 hear your due process argument.  
2 Either your firm can make some new law and enhance its  
3 reputation at some potential financial risk. Or, you don't  
4 want to handle this matter.  
5 But I cannot make a ruling on an intriguing, novel to  
6 me, due process argument. I can't get any money for a lawyer.  
7 I can't appear without a lawyer. I can't appear pro se. I  
8 can't get money into New York to a lawyer because I have this  
9 attachment. I have a due process right to vacate the  
10 attachment.  
11 I'm not going to do the research from scratch. That's  
12 not my job.  
13 MS. VAN HEMMEN: If I may, your Honor, I understand  
14 the court's position perfectly clearly, but I also feel  
15 compelled to just make a record here this morning, if you'll  
16 just let me proceed so that it has been said on the record, the  
17 position of my client.  
18 I really don't know where this is going. There's  
19 payoffs in Australia. And I'm trying to do my best with the  
20 facts in front of me. So I would just like to say my piece so  
21 that I get to report back I have made the applications that my  
22 client has instructed me.  
23 THE COURT: You haven't made the applications. I will  
24 not accept them otherwise than in writing.  
25 These are serious, significant, intriguing issues;  
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1 complicated issues of law.  
2 You are coming in here making a representation to me,  
3 based on hearsay, not under oath and not of your own personal  
4 knowledge, that your client is unable to retain counsel because  
5 it has no money because of these attachments.  
6 I'm not prepared to accept that.  
7 I'm prepared to accept it if it's made in proper form.  
8 MS. VAN HEMMEN: Yes, your Honor.  
9 THE COURT: Okay. I'm prepared to accept an order to  
10 show cause with an affidavit. I'm prepared to give you as fast  
11 a hearing as it's humanly possible to give you.  
12 MS. VAN HEMMEN: Unfortunately, fastness is normally  
13 what I would look for and that is how I was intending to  
14 proceed until last night, until there's resolution of those  
15 issues on fees because they are considerably in arrears and  
16 they need to come up with fees for us to go forward. If I were  
17 to stand here today and ask you for a fast --  
18 THE COURT: But they're not considerably in arrears  
19 because of the attachment.

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20 They are considerably in arrears, you say, because  
21 they have no money.  
22 MS. VAN HEMMEN: No. They were trying to send -- they  
23 were trying to send money, which would have brought them up --  
24 I was expecting more than the ten, quite frankly. And it turns  
25 out it was just the ten. The ten would have brought them up to

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1 their current --  
2 THE COURT: I hear what your problem is.  
3 MS. VAN HEMMEN: -- debt.  
4 THE COURT: I used to be in private practice. Believe  
5 me. You have every sympathy. This is extremely intriguing.  
6 It's very intriguing.  
7 MS. VAN HEMMEN: Could I suggest one solution that I'd  
8 just like to get on the record?  
9 THE COURT: Sure.  
10 MS. VAN HEMMEN: This ten thousand dollars that has  
11 been seized by wilhelmsen, they're already secured, last I  
12 heard, to the tune of about nine hundred thousand.  
13 I'm wondering if it's within the court's equitable  
14 powers under admiralty to instruct them to release that ten and  
15 to allow another 20 to go forward so that the defendant, for  
16 whom they're seeking this remedy, is in a position to appear in  
17 court. And I believe that the court has certain inherent  
18 equitable powers as well.  
19 THE COURT: I do have inherent equitable powers. I  
20 understand that I have inherent equitable powers.  
21 All you're doing is standing up and telling me --  
22 well, let me hear from your opponent.  
23 This is, and I will say it on the record, the perfect  
24 example of why Winter Storm is a disastrous development in the  
25 law.

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1 MS. VAN HEMMEN: And on the heels of that --  
2 THE COURT: In addition to consuming inordinate  
3 amounts of the time of the court in the Southern District of  
4 New York.  
5 MS. VAN HEMMEN: Your Honor, on the heels of that, I  
6 would like to start laying the foundation in the event that we  
7 are able to stay on as counsel, and I heard your view toward  
8 the EFTs which --  
9 THE COURT: But the first thing we're going to do, if  
10 you stay on as counsel, is decide if this is a maritime  
11 contract; and if it's not, I'm going to vacate the attachment  
12 and that will be the end of it. I will not go out of my way to  
13 reach out for some other issue.  
14 I can't reverse the Second Circuit on Winter Storm.  
15 Former Chief Judge Walker questioned Winter Storm in a footnote  
16 in Aqua Stoli. But it's good law, and I will follow it. I  
17 will not overturn it until such time as the Second Circuit has  
18 done so.  
19 MS. VAN HEMMEN: Should we be put in funds and proceed  
20 as counsel, and should we make a determination that this is a  
21 maritime contract, we will be petitioning the court for an  
22 interlocutory appeal, which I understand requires exceptional  
23 circumstances. So I just mention to the court that these facts  
24 here today, I hope, at that time, if and when it develops, will

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 25 be borne in mind when it comes to the exceptional circumstances  
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 1 because we have two ongoing business entities that really are  
 2 on their knees and one in the process of considering winding up  
 3 as of last night.  
 4 THE COURT: Yes. Is there an arbitration pending  
 5 anywhere?  
 6 MR. FREVOLA: There is not, your Honor, and that's  
 7 because there was a --  
 8 THE COURT: Is there an arbitration clause between you  
 9 and UBS or you and Rae Corp?  
 10 MR. FREVOLA: I believe there is, your Honor.  
 11 THE COURT: Where. Show it to me. Physically. This  
 12 minute. Give it to me. Put it in my hand. The arbitration  
 13 clause.  
 14 MR. FREVOLA: I don't have a copy of the verified  
 15 complaint.  
 16 THE COURT: Well, excuse me. You brought a verified  
 17 complaint in this court and are seeking an attachment in aid of  
 18 an arbitration that doesn't exist and there may not be an  
 19 arbitration clause. You show me the arbitration clause right  
 20 now.  
 21 MR. FREVOLA: May I approach, your Honor?  
 22 THE COURT: Yes. Please announce what the provision  
 23 is.  
 24 MR. FREVOLA: Provisions 14.8 and 14.9, your Honor, of  
 25 the Sumitomo general terms and conditions.  
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 1 THE COURT: You're not Sumitomo. You're not Sumitomo.  
 2 MR. FREVOLA: Your Honor -- I'd have to go back to  
 3 look.  
 4 THE COURT: I said do you have an arbitration clause  
 5 in your contract with UBS.  
 6 MR. FREVOLA: The correspondence between the parties,  
 7 your Honor, incorporated the Sumitomo general terms and  
 8 conditions.  
 9 THE COURT: Where? Show me.  
 10 MR. FREVOLA: I don't have a copy of the  
 11 correspondence with me.  
 12 THE COURT: What are you doing in court without your  
 13 papers? What are you doing in court without your papers?  
 14 That's a contract between Sumitomo and somebody else.  
 15 MR. FREVOLA: Again, your Honor, it's my understanding  
 16 that these terms and conditions were sent to UBS and that it  
 17 said it will incorporate these terms, including the arbitration  
 18 clause. And there is ample case law that deals with the issue  
 19 of incorporation of an arbitration clause by reference between  
 20 the parties.  
 21 THE COURT: Yeah, but you haven't shown me anything  
 22 that incorporates it by reference between the parties.  
 23 MR. FREVOLA: You're right, your Honor, I haven't. I  
 24 should have brought that paper with me. I regret that. I  
 25 thought this was just going to be a scheduling conference, your  
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1 Honor. I didn't know any application was going to be made  
2 today.

3 Even if there was not an arbitration clause, your  
4 Honor, and there -- it's our position there is.

5 Right now the reason why arbitration hasn't gone  
6 forward in London is because there is what's known as a  
7 statutory demand which has been made in Australia on UBS. And  
8 what a statutory demand is, is a procedural device under  
9 Australian law which is a precursor towards putting someone  
10 into receivership. And because there was a bankruptcy  
11 proceeding in Australia, it would raise issues as to whether  
12 arbitration would go forward in London. That's why there  
13 hasn't been an arbitration yet commenced in London.

14 THE COURT: So they are in financial distress.

15 MR. FREVOLA: I don't think there's any disagreement  
16 on that, your Honor.

17 And if there wasn't an arbitration clause, your Honor,  
18 this would be just a general purpose, garden variety maritime  
19 attachment, or just similar to a Rule C arrest or Rule B  
20 attachment of cargo.

21 THE COURT: Except that there's a dispute about  
22 whether this is or is not a maritime -- the contract between  
23 you and UBS is a maritime contract.

24 MR. FREVOLA: And I believe, your Honor, the U.S.  
25 Supreme Court in Exxon v. Central Gulf Lines back in the

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1 mid '90s answered this question. And we responded to and be an  
2 opponent in the Central District of California in a case back  
3 in May on this very issue, where it was -- in this situation  
4 the fuel had not even been provided to the vessel and  
5 nevertheless it was still a maritime contract.

6 In this context, your Honor, every one of these  
7 claims, fuel was provided to the vessel.

8 There is also an equitable doctrine dealing with a  
9 person stepping into the shoes of the provider if they pay that  
10 provider. That doctrine may also apply to make it a maritime  
11 contract.

12 I don't think we have to go that far. I think Exxon  
13 v. Central Gulf Lines -- I think it's right on point.

14 Plus, there was a requirements contract where there  
15 are people being retained around the world to do this and  
16 Waterman Steamship Company wound up getting a supplier in  
17 Jeddah, Saudi Arabia to do this very thing. It was a maritime  
18 contract.

19 The Supreme Court said this contract is a contract if  
20 it was done directly by the supplier. It cannot not be a  
21 maritime contract just because agents somewhere else did it for  
22 them. And that, your Honor, would be our argument in terms of  
23 the preliminary services doctrine.

24 I'm trying to take a look to see anything else.

25 I believe those are the issues.

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1 THE COURT: Were you the agent for the supplier? I  
2 thought you were the agent for the buyer.

3 MR. FREVOLA: No, your Honor. We are the agent for  
4 the supplier.

5 THE COURT: You had a contract with Sumitomo, not with  
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6 UBS? You have no contract --  
 7 MR. FREVOLA: Both of them. We were in between.  
 8 AS I understand it, you have UBS we were then tasked  
 9 to go out and get it --  
 10 THE COURT: Excuse me. Wait. You had a contract with  
 11 UBS, who tasked you to go out and get something. So UBS hired  
 12 you as its agent to go out and buy oil for it, which you did,  
 13 from a supplier, from somebody who had oil.  
 14 MR. FREVOLA: To supply --  
 15 THE COURT: You weren't Sumitomo's agent. You were  
 16 the broker. You were the buyer's broker.  
 17 MR. FREVOLA: No, your Honor. We were hired to wind  
 18 up, procure bunkers for specific vessels. And we wound up by  
 19 making it possible so that vessel was supplied.  
 20 If you look at Exxon v. Central Gulf Lines, your  
 21 Honor, it covers this.  
 22 THE COURT: What's the citation on that?  
 23 MR. FREVOLA: I don't have the citation on that.  
 24 MS. VAN HEMMEN: I might even have the case, and it's  
 25 clearly distinguishable.  
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1 May I, your Honor.  
 2 Your Honor, may I comment on that?  
 3 THE COURT: No. Let him finish.  
 4 MR. FREVOLA: I believe that I've answered the  
 5 outstanding issues in terms of what was been presented,  
 6 obviously, in terms of briefing --  
 7 THE COURT: No, you haven't because there's a due  
 8 process -- there's an argument that the Rule B due process  
 9 rights of UBS are being violated by your attachment of the  
 10 funds that were being sent to pay a lawyer to come into court  
 11 and respond to this.  
 12 We agree that UBS has a due process right to move to  
 13 vacate this attachment. That's the only reason that maritime  
 14 attachment is constitutional, right?  
 15 MR. FREVOLA: Agreed, your Honor.  
 16 THE COURT: And we agree that in the State of New  
 17 York, state and federal courts, a corporation can only appear  
 18 by counsel, right?  
 19 MR. FREVOLA: Yes, your Honor.  
 20 THE COURT: And we agree, do we not, that lawyers have  
 21 a right to be paid?  
 22 MR. FREVOLA: Yes, your Honor, I've been --  
 23 THE COURT: Would Holland & Knight go on record as  
 24 saying that lawyers have a right to be paid?  
 25 MR. FREVOLA: Yes, your Honor.  
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1 And your Honor, we have been in the same position as  
 2 Ms. Van Hemmen is right now, and I understand it, and I  
 3 actually, your Honor, in terms of -- if there's a potential to  
 4 do it, we tend to let these go if -- we make a recommendation  
 5 to let them go if they can be let go, in this certain context.  
 6 THE COURT: What do you mean, we make the  
 7 recommendation to let what go?  
 8 MR. FREVOLA: If the client, depending on the  
 9 situation between the parties, depending on how large the debt  
 10 is, how acrimonious the dispute is, we tend to say that perhaps

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11 it makes sense to allow the retainer to go through, as a  
 12 courtesy, because we've been on the other side of this, your  
 13 Honor. I understand it.  
 14 I have posed that question to my client.  
 15 THE COURT: Has the due process issue ever been  
 16 litigated?  
 17 MR. FREVOLA: I am unaware of that, your Honor. I  
 18 don't think so.  
 19 THE COURT: Because it's a very intriguing issue.  
 20 MR. FREVOLA: These things tend to raise very  
 21 interesting issues, your Honor, and they are always new.  
 22 THE COURT: Very intriguing issue.  
 23 MR. FREVOLA: Your Honor, would it make sense for  
 24 me -- I have not gotten an answer back from my client one way  
 25 or another on this. Would it make sense for me to ask my  
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1 client about allowing the retainer to come through?  
 2 THE COURT: It would certainly make a lot of sense for  
 3 you do that.  
 4 MR. FREVOLA: I will do that today, your Honor.  
 5 THE COURT: Because if you don't, it seems to me that  
 6 I'm going to have to decide whether the due process rights of  
 7 UBS are being violated by your clients' taking or stealing,  
 8 depending on how you look at it, their lawyer's money and  
 9 thereby preventing them, by the use of this -- that would be  
 10 constitutionally infirm but for their right to come into court,  
 11 literally preventing them from coming into court.  
 12 MR. FREVOLA: The only other thing in terms of, for  
 13 scheduling, I am about to purchase tickets to go to Norway to,  
 14 among other people, visit this particular client for not this  
 15 coming week but the week following.  
 16 THE COURT: Yes, but you have a very large firm.  
 17 MR. FREVOLA: Yes, your Honor.  
 18 THE COURT: And I swore to God when I was at Paul,  
 19 weiss that I would never say that if I ever became a judge, and  
 20 I am foresworn.  
 21 MR. FREVOLA: Thank you, your Honor.  
 22 THE COURT: But you're taking their money without any  
 23 adjudication of the dispute between you and, indeed, prior to  
 24 the time when any court or arbitral panel, be it a court or  
 25 arbitral panel that would have jurisdiction, is seized of the  
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1 dispute between you for four-and-a-half million dollars. So no  
 2 progress is being made to adjudicate that. And I just want you  
 3 to understand that you should go to Norway. Just make sure  
 4 somebody else in your firm is covering the file because we will  
 5 move very, very expeditiously.  
 6 You need to get back to me by the first thing Monday  
 7 morning, and certainly get back to your opponent -- if she's,  
 8 in fact, your opponent -- with a word on whether the retainer  
 9 money is going to come -- be allowed to go through.  
 10 MR. FREVOLA: Yes, your Honor.  
 11 THE COURT: If it's not, then because you are holding  
 12 the money, you have 48 hours or until noon on Wednesday to  
 13 serve me with a brief explaining why you have not violated  
 14 UBS's due process rights by taking the money that's intended  
 15 for them to appear by counsel, which is the only way that they



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16 can appear, for the purpose of vindicating their constitutional  
17 right to vacate the Rule B attachment. Or you could concede  
18 that their due process rights are thereby violated. That may  
19 give you some leverage with your client who might prefer not to  
20 have an opinion on this issue floating around out there.

21 Okay. Now, let's make an assumption. Let's make an  
22 assumption that your firm gets a little money. How quickly can  
23 you get your order to show cause before me?

24 MS. VAN HEMMEN: How about the following Monday, your  
25 Honor.

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1 THE COURT: Fine. So get the people ready at your  
2 firm -- so we're talking Monday the 18th. I have a trial  
3 starting Monday the 4th. So I'm going to want to do a hearing  
4 on Friday. I have conferences all morning. So, it will be  
5 Friday afternoon. I'll need responsive papers by Thursday at  
6 noon.

7 Everybody knows what the issues are. Is there a  
8 maritime contract? Is there any underlying basis for an  
9 attachment? I know that an arbitration does not need to have  
10 been commenced. I know that. I've read that in the cases, but  
11 that really isn't the issue.

12 And let's get all these issues decided. It seems to  
13 me that it's a pretty finite amount of work for each of us to  
14 do to get these issues decided.

15 Now, the alter ego issue is somewhat more complicated.

16 MS. VAN HEMMEN: And I was going to raise that. Our  
17 view is they haven't made a prima facie case, and we do intend  
18 to brief that as well.

19 THE COURT: Fine. And I'm prepared to listen to --  
20 it's your burden, of course, and I'm prepared to listen to  
21 witnesses on that.

22 MS. VAN HEMMEN: Your Honor, I understand your issue  
23 on the EFTs. However, this ultimately could be going up on  
24 appeal and so it's an issue we would want to preserve.

25 THE COURT: Fine. Preserve -- write one sentence in.  
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1 Winter Storm should be reversed.

2 And I won't reverse it. Okay. But then you can take  
3 it up.

4 And if -- and of course the panel of the second  
5 Circuit won't reverse it, but if the panel wants to see if they  
6 want to en banc the issue --

7 MS. VAN HEMMEN: Thank you, your Honor.

8 THE COURT: But we all understand that my hands are  
9 tied.

10 MS. VAN HEMMEN: Understood.

11 THE COURT: When they have these hearings in front of  
12 the Senate, some senator always says: Now, you understand that  
13 you are not a lone ranger. You are bound by the decision --  
14 what court are you bound by the decisions of? The Supreme  
15 Court and the United States Court of Appeals for the Second  
16 Circuit. We all did it.

17 I'll hear from you Monday morning.

18 MS. VAN HEMMEN: Thank you, your Honor.

19 MR. FREVOLA: Thank you, your Honor.

20 THE DEPUTY CLERK: Hearing the 28th in the afternoon



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21 did we say?  
22 THE COURT: That's what we said.  
23 THE DEPUTY CLERK: Two o'clock.  
24 THE COURT: Unless, put it on for the following  
25 Monday. I don't know what you have on the following Monday.  
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1 THE DEPUTY CLERK: we could put it on --  
2 THE COURT: we can't because we have a trial on the  
3 24th.  
4 Put it on for Monday.  
5 THE DEPUTY CLERK: Monday at 10:00. That's October 1.  
6 MR. FREVOLA: That would be the hearing?  
7 THE DEPUTY CLERK: The hearing. 10:00. October 1.  
8 MR. FREVOLA: And the briefing would be September 17  
9 for the initial moving; September 20 for our responsive.  
10 THE COURT: I was talking about doing the hearing on  
11 Friday the 21st.  
12 THE DEPUTY CLERK: Then it's all right.  
13 THE COURT: Let's put dates on all this.  
14 When are you going to have your order to show cause to  
15 me?  
16 MS. VAN HEMMEN: A week from Monday, your Honor.  
17 THE COURT: So it's Monday the 24th -- no, it's  
18 Monday the 17th. We're talking about a hearing on Friday the  
19 21st, is what I thought we were talking about. Now Friday the  
20 21st is Yom Kippur, and there's stuff on.  
21 (Pause)  
22 THE COURT: We're going to put it on for the 21st and  
23 we'll start the trial on the 22nd -- I'm sorry, Monday the  
24 24th. We'll start the trial on Tuesday.  
25 THE DEPUTY CLERK: 9:30 on the 24th. (Adjourned)  
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